SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1069

GREAT LAKES DREDGE & DOCK COMPANY,
Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

The special findings of fact and opinion of the Court of Claims is set forth in the accompanying transcript of the record, pages 10 to 39, inclusive.

Jurisdiction

The judgment below was entered January 7, 1946. (R. 39) The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. part 2, 752.

Contract Provisions Involved

The provisions involved are paragraphs 1-08 and 4-03 of the contract specifications. They are set forth in the petition for the writ and in the transcript of the record (R. 12-13) and are therefore not reproduced herein, this brief being attached to the petition.

Statement of the Case

The suit, as indicated in the petition, grows out of a contract between petitioner and the United States for performing certain dredging work in the Cape Cod Canal and in Hog Island Channel in Buzzards Bay, Massachusetts, including the dredging of a channel leading into Onset Bay. (R. 11)

On the monthly estimates of the quantity of material for which petitioner was entitled to receive payment, the contracting officer deducted, at the contract unit price of 34.25¢ per cubic yard, scow measurement, 258,005 cubic yards of material as excessive side-slope dredging, and 185,388 cubic yards as excessive overdepth dredging.

The contract provision controlling the situation in regard to such deductions is found in paragraph 4-03 of the specifications. (R. 13)

Under the plans and specifications, the petitioner was required to dredge the channel leading into Onset Bay to a depth of 17 feet over a bottom width of 100 feet; and in the Cape Cod Canal and Hog Island Channel in Buzzards Bay it was required to dredge the channel to a depth of 32 feet over a bottom width of 315 feet. (R. 34)

Paragraph 4-03 authorized the dredging to be carried down an additional three feet; and further provided that the contracting officer would prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut.

The specifications made no provision for side slope dredging, but the drawings had indicated thereon a side slope line of 1 foot vertical to 2½ feet horizontal, and the total estimated quantity of material stated in the specifications as likely to be removed within the specified limits included the material lying above the aforesaid side slope line. The side slope line shown on the drawings represented the natural slope that it was assumed the material would take as a result of the dredging required in the channel.

The contracting officer did not prescribe any overcuts to be made to prevent the encroachment of material from the sides of the channel (R. 37) and it is the contention of petitioner that his failure to do so constituted a breach of the contract, and that it is therefore entitled to receive payment for the 258,005 cubic yards of material that was dredged within the limits of the specified area which was deducted as excessive side-slope dredging.

In the specifications (par. 1-08) it was stated that during the progress of recent contracts the prescribed cuts had been secured by the contractor after the removal of about 75% of the estimated quantity of material in the cut, scow measurement, including overdepth, and indicated that the other 25% had been removed by erosion and the rapid currents. (R. 12) However, in making the deductions for excessive overdepth and side-slope dredging no reduction in the quantity was made for the 25% of material removed by the rapid currents.

The situation, therefore, resolves itself into a matter of the proper interpretation to be placed upon the two provisions of the specifications hereinbefore mentioned.

Specification of Errors to Be Urged

Petitioner contends that the Court of Claims erred in the following respects:

1. In holding that paragraph 4-03 of the specifications does not make it mandatory upon the contracting officer to prescribe any particular overcut.

2. In holding that even though paragraph 4-03 does make it mandatory upon the contracting officer to prescribe some overcut, petitioner is unable to show how much of the deduction was due to his failure to prescribe any.

3. In holding that petitioner was no tentitled to an adjustment of 25% for the erosion factor in the determination of the quantity of material to be deducted as excessive overdepth dredging.

ARGUMENT

I

Petitioner's Right to Reimbursement for the Material Deducted as Excessive Side-slope Dredging

In the case of *Hollerbach* v. *United States*, 233 U. S. 165, 171, this court promulgated or stated the following rule in regard to the interpretation of government contracts which has been applied to many cases and is believed to be applicable in this instance, to-wit:

> A government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument.

Another familiar rule of construction is that where a contract is prepared in one of the government departments,

leaving the contractor no choice as to form or phraseology, it must, where the wording gives rise to doubt, be construed against the government and favorably to the contractor. *Moore* v. *United States*, 196 U. S. 157; *Noonan* v. *Bradley*, 9 Wall. 394; *Garrison* v. *United States*, 7 Wall. 688.

The provision in paragraph 4-03 of the specifications for the prescribing of overcuts to be made to prevent the encroachment of material from the sides forms a material part of the contract and has an important bearing on the work. It must, therefore, be given effect, and a sensible meaning applied to it. *Burdon Central Sugar Refining Co.* v. *Payne*, 167 U. S. 127; *Clark* v. *United States*, 6 Wall. 543. The purpose is obvious, namely, to prevent the encroachment of material from the sides of the dredged cut, and it so states.

The evidence shows, as found by the Court of Claims (finding 18, R. 26-27), that the areas to be dredged were laid out by the government engineers in cuts, and marked by stakes and ranges, as required by paragraph 2-01; that petitioner in its dredging operations along the sides dredged within the limits of the range on the stakes fixed by the government engineers for its guidance (finding 26, R. 31); and that in dredging the side cuts the dredge was kept far enough inside of the area lines to prevent any digging beyond the specified limit lines (finding 22, R. 29). Moreover, the court found as a fact (R. 29) that all of the side slope material dredged and removed by petitioner was dredged within the limits indicated by the stakes and ranges.

The depicting of side slope lines on the drawings was understood to be for the purpose of obtaining uniformity in bids. It was known that material from the sides would fall or slide into the channel as the work was being performed and would have to be taken into account in the preparation of a bid; therefore, there was included in the

estimated quantity of pay yardage on which the bids were to be based the material lying above the line representing the natural slope that it was assumed the material would take as a result of the dredging required in the channel.

The petitioner was not obliged to assume that the material in the banks would take the slope indicated, but was obliged and required to dredge and redredge the bottom of the channel until there had been obtained the required width and depth below mean low water regardless of how much side slope material came into the channel during the process. It had the assurance of respondent, as set out in paragraph 4-03 of the specifications, that the contracting officer would prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut, certainly any in excess of that lying above the indicated slope line which was included in the quantity of estimated pay yardage likely to be removed within the specified limits. The contracting officer, however, did not see fit to comply with the contract requirement for overcuts.

The failure of Government officials to observe express contractual obligations has been held to constitute a breach of the contract subjecting the Government to a suit for the recovery of damages. *Barlow* v. *United States,* 82 C. Cls. 360.

II

Petitioner's Right to a Correction of the Deductions to Exclude Known Erosion

It was a known fact, determined from experience in the performance of previous contracts for dredging in Cape Cod Canal that erosion and the rapid currents caused a loss or removal of 25% of the material when disturbed by the process of dredging. It was referred to in the specifications (par. 1-08, R. 12) and prospective bidders were informed that the estimated quantity of material likely to be removed

by dredging was the estimated pay yardages only, or 75% of the material actually within the area.

Under paragraph 4-04 of the specifications (R. 13) the material removed was to be measured by the cubic yard in scows at the dredge. Obviously material removed by erosion and the currents did not reach the scows for measurement and payment.

The deduction for excessive overdepth dredging or excessive side-slope dredging is limited to material "taken" from beyond the contract limits. Certainly the reference to material taken must be to that which was removed by the dredge and placed in the scows to be measured for payment. A single cut through the Canal could start erosion that might result in the removal of many thousands of yards of the material by the rapid currents.

The lower court's interpretation that the engineer's computation of the quantity of material to be deducted did not require correction to eliminate the 25% erosion factor appears to conflict with the finding of this court in the case of *Clark* v. *United States,* 6 Wall. 543; and with its own decisions in *Barlow* v. *United States,* 35 C. Cls. 514, and *Collins* v. *United States,* 34 C. Cls. 294, 332.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the Court of Claims ruling in regard to the two matters herein referred to by petitioner.

Respectfully submitted,

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Counsel for Petitioner.